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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ALEXANDER GOROVITZ, Plaintiff and Appellant, v. CAROLE ANN MARSHALL, Defendant and Respondent.	A099241 (Solano County Super. Ct. No. SLO-12918)

Alexander Gorovitz sued Carole Ann Marshall in negligence for personal injuries and lost wages from a bizarre automobile collision on Interstate 680 (I-680). Jury trial evidence showed that Marshall was driving southbound on a two-lane frontage road at 60 miles per hour (mph) after dark when she braked and veered left to avoid a truck she saw coming in her lane. She escaped that peril but left the road spinning, traversed a dirt shoulder and barbwire fence, and came to rest on the southbound lanes of I-680, where a vehicle driven by Gorovitz collided obliquely with the rear of hers and spun her another 180 degrees. Marshall admitted traveling above a 55-mph speed limit, and trial focused on causation and damages. One expert testified that the collision would have occurred at 55 mph, too, with Marshall's car being squarely broadsided, and medical experts differed over the extent to which lower back pain claimed by Gorovitz was due to the impact or a chronic degenerative disc condition.

The jury returned a special verdict that found Marshall to have been negligent, but such negligence was not a cause of damage to Gorovitz. Gorovitz moved for judgment notwithstanding the verdict or a new trial, claiming insufficient evidence to support the

no-causation finding, plus inadequate damages. The court denied both motions. Gorovitz appeals both the judgment and denial of posttrial motions. We affirm.

BACKGROUND

Because the dispositive issues on appeal concern causation, we may focus on the collision evidence and only briefly summarize the rest. Gorovitz operated a business involving on-screen advertising in movie theaters. On the evening of July 22, 1998, he was driving southbound in a Toyota Landcruiser on I-680, between Fairfield and Benicia, after two days spent in Sacramento training a sales manager. It was dark, with clear traffic ahead and "[p]erfect" weather, and he was in the fast lane with his cruise control set at 65 mph. He noticed a "bowl" of dust 50 or 60 feet ahead to his right and then a car coming across toward the center barrier. He did not recall braking but did swerve right as hard as he could to avoid a collision and caught the rear of the oncoming car, spinning it before coming to a stop himself.

Carol Ann Marshall (Warner by the time of trial) had worked for years at a Costco in Fairfield and, having left a work shift ending at 8:45 p.m., drove her Buick Skylark southbound on Lopes Road toward her home in Benicia. The undivided two-lane road parallels I-680 in that area, on her left, and she preferred the road over the freeway, since it tended to be a less crowded and more leisurely drive. Lopes Road had some curves and dips. Speed signs back near Benicia indicated 35, 45 and 40 mph, at curves, but the last such sign (40 mph) was about five miles back, and the road was now straight and out in the countryside, with telephone poles and fences to the right and uneven dirt to the left. It was dark, with clear weather and no traffic. She was not on a phone, eating, drinking, on medication, tired or listening to the radio. She was not doing or distracted by anything.

Marshall's habit was to check her speed regularly and, before the accident, she recalled glancing down at her speedometer to see that she was going 60 mph, about five mph over what she felt was the speed limit. She thought to slow down but, looking up, saw headlights approaching about 100 yards off, first in the left lane but then, at about 50 to 75 yards, in her own lane. From their height and what she could see of the vehicle, it looked like a dark pickup truck. She turned left as hard as she could and hit the brakes,

losing control of the car. She spun two full circles, she thought, before coming to a stop. Her car had gone across dirt, through brush and a barbwire fence, over more dirt and onto the freeway's southbound lanes, where it came to rest facing southbound. She did not see or hear Gorovitz's vehicle approaching from the rear but felt the impact, which spun her another 180 degrees, to face oncoming traffic.

Marshall was not hurt. She went up to Gorovitz, where an officer asked how she was. She told the officer she was fine and told Gorovitz she was sorry and, " 'If I could have prevented this accident I would have.' " Paramedics were on the scene. She said, " 'I'm so sorry. Are you okay?' " Gorovitz replied, " 'I am fine,' " but wanted to get out and look at his truck. Marshall told the officer that she was going 60 mph (a report notation of 65 being in error, she testified).

Nearly everything related to damages was disputed in some way or another. Gorovitz did not seek recompense for damage to his Landcruiser, which was repaired, but apparently because it was indirect evidence of the personal injuries he claimed, there was dispute over whether everything he had repaired was due to the collision. (Marshall gave her damaged Skylark away for use in a destruction derby.)

Experts differed somewhat on the physical impact of the collision. James Hughes, an accident reconstructionist testifying for the defense, found an "angled" and "scraping" rather than "straight on" hit, and calculated a delta velocity (speed change on impact) of about 10 mph, with G (gravity) forces of .83 to 1.86. Rajeev Kelkar, a reconstructionist for Gorovitz, found a less oblique hit, a delta velocity range of 8 to 12 mph and, at 10 mph, a G force of about 4.5. (Comparable G forces are 1 for braking hard, 5 for flopping down in a chair, and 6 for hopping off a step.)

Hughes also opined that Marshall acted reasonably in taking her evasive action and probably only spun completely around once. He further opined that, had she been going 55 rather than 60 mph, she still would have been unable to safely avoid the truck and would have collided with Gorovitz anyway, producing a more direct, broadside hit.

Gorovitz made no mention of back pain at the collision scene or the next day, at the office of his treating physician, Julie Quackenbush, to whom he had been just three

weeks earlier for treatment of low back pain. She found his spine to be "non-tender." He did complain of general achiness, wrist pain, and disorientation, but he had no swelling or tenderness of the wrists. He did not complain of chest pain, but Quackenbush called his attention to a bruise there, apparently left by a seatbelt; his air bag had not inflated during the collision. Those ailments, plus scraped knees, subsided quickly, but Gorovitz's claim at trial was that preexisting back pain, which he described as intermittent up to that point and subsiding for months at a time, began to be chronic. In November 1999, he began seeing neurosurgeon Donald Prolo for his back, while continuing with Quackenbush for diabetes treatment. He claimed medical expenses exceeding $16,000, chronic pain, and diminished ability to conduct his business, with resulting loss of income.

Gorovitz was 48 years old at the time of the collision and had a history of medical treatment for lower back pain beginning in the early 1980's, with surgery discussed as a treatment option by two physicians in 1991. Gorovitz also had a history of diabetes and obesity, plus failure to comply with recommended monitoring, exercise or weight loss. Testimony conflicted on how much, if at all, the collision worsened his back problems. The most generous view came from Prolo, who apportioned 70 percent to preexisting conditions and 30 percent to the collision, but the defense impeached that view as formed in ignorance of much of Gorovitz's medical history and several falls he had experienced after the collision. A defense expert, neurological surgeon DeWitt Gifford, examined Gorovitz, and the evidence, and found no likely difference, with or without the collision.

The jury took 90 minutes to return a special verdict finding Marshall "negligent" but answering "no" to the question, "Was such negligence a cause of damage to the plaintiff?" Questions on the amount and apportionment of damages were not reached.

DISCUSSION

As he did in his posttrial motions, Gorovitz claims lack of substantial evidence to support the jury's finding of no-causation and award of no damages. Given evidence that he sustained at least some harm in the collision and that the jury did find Marshall to have acted negligently, he argues that it is beyond any rational construction of the evidence to say that her negligence played no part in the collision or that there were no damages as a

result. Marshall retorts that the evidence allowed jurors to discredit Gorovitz's claims of income loss and back injury being caused by this collision (as opposed to preexisting conditions and failure to follow medical advice), to find that Marshall's acts fell within the doctrine of imminent peril, and to find that the truck driver crossing into her lane was the sole cause and that Marshall's negligence was not a substantial factor.

Gorovitz clarifies his position in his reply brief. He does not dispute that the jury could reasonably have concluded that his "*back problems* were not caused by" the collision, that he "had significant preexisting injuries" and failed to follow physician directions "to mitigate his back problems," and that his "testimony as to the nature and extent of his injuries was subject to question." Conceding that these things bore on causation and the "nature and extent" of his damages, he maintains that they cannot support the jury's no-causation finding altogether, given "uncontested" proof that he sought treatment for non-back injuries the day after the collision. He also argues that the doctrine of imminent peril could not have had any impact on those issues because, if properly applied and used by the jury, would have precluded "a finding of negligence . . . in the first place."

In approaching these arguments, we must resolve all conflicts in favor of the respondent, and indulge all legitimate and reasonable inferences to uphold the verdict if possible. The power of an appellate court begins and ends with a determination whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429; *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.) We start with the presumption that the record contains evidence to sustain every finding of fact and require the appellant to demonstrate that there is no substantial evidence to support a challenged finding. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) Failure to cite all material evidence in the record, for and against a finding, waives any claim that it lacks support (*ibid.*; *In re Marriage of Fink* (1979) 25 Cal.3d 877, 887-888); the testimony of a

single witness, even a party himself or herself, may be sufficient support (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; Evid. Code, § 411).

While many of Gorovitz's substantial evidence arguments entail resort to the jury instructions, he does not challenge the correctness of those instructions. We accordingly accept them as concededly correct for purposes of his arguments.

I. *Negligence Finding*

We begin with the negligence finding and reject Gorovitz's position that the doctrine of imminent peril played no proper part in the jury's verdict. He is correct that the doctrine, as applied under given instructions, would involve only issues of duty and breach (i.e., negligent acts), and not causation,[1] but he mistakenly assumes that, because jurors found negligence, the doctrine played no part. Gorovitz's jury arguments, like the instructions, posited *two* negligent acts by Marshall. One was speeding and was offered on two bases—going five mph faster than a 55-mph limit governing undivided two-lane highways (Veh. Code, § 22349, subd. (b)) or exceeding the basic speed law which, more generally, prohibits any speed greater than what is safe, reasonable and prudent under the

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[1] Standard instructions were read as follows: "A person who, without negligence on her part, is suddenly and unexpectedly confronted with peril arising from either the actual presence of, or the appearance of, imminent danger to herself or to others, is not expected or required to use the same judgment and prudence that is required in the exercise of ordinary care in calmer and more deliberate moments. Her duty is to exercise the care that an ordinarily prudent person would exercise in the same situation. If at that moment she does what appears to her to be the best thing to do, and if her choice and manner of action are the same as might have been followed by any ordinarily prudent person under the same conditions, she does all the law requires of her. This is true even though in the light of after-events, it should have appeared that a different course would have been better and safer." (See BAJI No. 4.40.)

"When a situation of peril such as that just described is caused by someone's negligence, and the person in peril, acting under the impulse of fear, makes an[] instinctive and reasonable effort to escape and, in so doing, injures a third party, this negligence that caused the peril is deemed to be a cause of the injury. This is true even though it might have appeared, or after the event it may appear, from the viewpoint of another person, that the effort to escape was unwise or that no one would have been injured if that effort had not been made or had been made differently." (See BAJI No. 4.41.)

circumstances (Veh. Code, § 22350). The other was making an unsafe turn left from the highway (Veh. Code, § 22107).

We presume in support of the verdict that jurors applied the doctrine of imminent peril to Marshall's sudden turn left, which she testified was due to the truck headlights suddenly appearing 50 to 75 yards ahead in her lane. Jurors could reasonably credit her testimony about the truck, even though Gorovitz's counsel questioned its existence at one point in jury argument ("if there is such a truck"). If jurors accepted the truck's travel as described by Marshall, they could reasonably have deemed it prudent to make the sharp turn left to avoid a deadly collision. An expert also testified that this was prudent and that attempting evasive action with a *right* turn was impractical because of a tree and a reflector-lit guardrail to the right.

Gorovitz offers no evidentiary argument to the contrary, and this comports with argument below by his counsel, who told jurors at one point: "I don't fault Mrs. Marshall for turning. I fault her for going at such a speed that when she turned she lost control and ended up causing this accident."

Gorovitz does argue, however, that the doctrine of imminent peril was *legally* inapplicable due to Marshall's admitted negligence in traveling five mph over the speed limit when she turned. Gorovitz misconstrues the doctrine. He cites an instruction that made it apply when "[a] person who, *without negligence on her part*, is suddenly and unexpectedly confronted with peril arising from . . . imminent danger to herself" (italics added; BAJI No. 4.40; see fn. 1, *ante*), but that language did not mean that Marshall had to be free of all negligence, only negligence creating the peril. Case law explains: "The imminent peril must arise from a sudden emergency, but where that emergency is created by the automobilist, or where he brought about the perilous situation, through his own negligence, he cannot avoid liability upon the ground that his acts were done in the stress of emergency. [Citation.] One cannot shield himself behind an emergency created by his own negligence." (*Vedder v. Bireley* (1928) 92 Cal.App. 52, 60-61; *Yates v. Morotti* (1932) 120 Cal.App. 710, 716.) The instruction reasonably conveyed the meaning just

explained, for it placed the qualifying phrase, "without negligence on her part," within the description of imminent peril.

The question, then, is whether substantial evidence allowed the jury to find that Marshall's speeding did not help create the peril.

But first, we further presume in support of the verdict that the jury, in finding negligent conduct, relied on Marshall's admitted five-mph violation of the 55-mph speed limit (Veh. Code, § 22349, subd. (b)) rather than some greater violation of the basic speed law (Veh. Code, § 22350).[2] Counsel for Gorovitz argued that the 55-mph limit was unsafe in the circumstances of driving on the two-lane highway at night, given dips and turns in the road, lower posted limits at points some miles away, and trouble discerning whether an oncoming car might be in one's own lane. He even suggested that, if Marshall had been going slower (later suggesting 40 mph), she might have been able to "slow down" and "pull off" the road to avoid the truck rather than veer left. The evidence, however, was that the weather was clear, that Marshall habitually drove that road and knew it well, that there was little traffic, that Marshall was not sleepy, hurried, eating, on medication, talking on the phone or listening to the radio, and that the roadway was straight where she encountered the errant truck. As for trial counsel's suggestion that Marshall should have been going slowly enough to react safely to a truck crossing into her lane, the jury could reasonably rely on instructions which explained: unless she

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[2] The court read jurors the maximum speed limit of 55 mph under Vehicle Code section 22349, but also read BAJI No. 5.30, as follows: "The speed at which a vehicle is driven upon a highway, considered as an isolated fact and simply in terms of so many miles an hour, is not proof either of negligence or of the exercise of ordinary care.

"Whether driving at that rate of speed is negligent, is a question of fact, the answer to which depends on all the surrounding circumstances.

"The basic speed law of this state, as provided by Section 22350 of our Vehicle Code, is as follows:

" 'No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for weather, visibility, the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.'

"A violation of this basic rule is negligence."

has reasonable cause to think otherwise, a prudent driver may assume that others are intelligent and have normal sight and hearing, and a driver is not duty-bound to anticipate an accident brought about by someone violating a law or duty (see BAJI Nos. 3.13 & 3.14). Gorovitz cites no unusual facts to support (much less compel) finding a duty on Marshall's part to anticipate the truck's head-on approach in her lane.[3] Indeed, a case cited by Gorovitz for another point held, on facts strikingly like ours, that the doctrine of imminent peril applied *as a matter of law* to excuse a driver's sudden turn left to try (unsuccessfully) to avoid the oncoming vehicle and therefore required reversal of a new trial that had been granted to a plaintiff based on insufficient evidence. (*Schultz v. Mathias* (1970) 3 Cal.App.3d 904, 910-914.)

Finally, we hold that substantial evidence allowed the jury to find that Marshall's speeding did not help create the peril. The peril was an oncoming truck that passed into Marshall's lane. There is no evidence to show, and no reason in logic to suppose, that the truck crossed into the opposing traffic lane in reaction to Marshall's speeding.

Thus we presume that the negligent conduct found by the jury was Marshall's act of driving five mph over the 55-mph speed limit. We accept that no evidence supports an

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[3] More fully, instructions on duty of care were read as follows: "The amount of caution required of a person in the exercise of ordinary care depends upon the conditions that are apparent or that should be apparent to a reasonably prudent person under circumstances similar to those shown by the evidence." (See BAJI No. 3.12.)

"It is the duty of the driver of any vehicle upon a public street or highway to exercise ordinary care at all times to avoid placing the driver or others in danger; and to use like care to avoid an accident; to keep a proper lookout for traffic and other conditions to be reasonably anticipated and to maintain a proper control of the vehicle." (See BAJI No. 5.00.)

"Every person who is exercising ordinary care, has a right to assume that every other person will perform her duty and obey the law, an[d] in the absence of reasonable cause for thinking otherwise, it is not negligence for such a person to fail to anticipate an accident which can occur only as a result of a violation of law or duty by another person." (See BAJI No. 3.13.)

"A person who is exercising ordinary care has a right to assume that other persons are ordinarily intelligent and possessed of normal sight and hearing, in the absence of reasonable cause for thinking otherwise." (See BAJI No. 3.14.)

implied finding that her five-mph breach was done in response to an imminent peril. This would be inconsistent with the negligent-act finding, and Marshall's testimony was that she *stepped on her brakes* in response to seeing the truck and, evidently, noticed her 60-mph speed either *upon or before* seeing the truck. An accident reconstruction expert also explained that this was prudent action and that taking evasive action with a *right* turn was impractical since a tree and a reflector-lit guardrail impeded turning to the right.

II. *No-Causation Finding*

Gorovitz's briefing against the no-causation finding is partly misdirected, for he complains over and over again that no jury could rationally find lack of any harm caused by the "accident." Legally, the question is not whether harm resulted from the *accident*, but whether it resulted from *Marshall's negligent conduct*—that is, from her speeding. Basic instruction under BAJI No. 3.00 defined the essential elements of negligence as being (1) that "[t]he defendant was negligent," and (2) that "[*t*]*he defendant's negligence* was a cause of injury, damage, loss or harm to plaintiff" (italics added). It follows, also contrary to Gorovitz's briefing, that opposing counsel *did not concede* causation in her argument when she told the jury that Gorovitz did suffer "some injury" in "this accident" —referring to bruising, and short term aches, and confusion. By saying, "So objectively I agree Mr. Gorovitz has had some injury in this accident and those were the injuries," counsel was not conceding that this was caused by any negligence by Marshall.

Gorovitz tries to argue that a finding of negligent conduct but no cause of injury was somehow inconsistent with the jury instructions and verdict form, but his same legal confusion about *what* must cause an injury—an "accident" versus a defendant's negligent conduct—muddles that argument, too. It is enough to note that all pertinent instruction correctly required the cause of harm to be the negligent conduct, including instruction on the essential elements of negligence (BAJI No. 3.00 [one element is that the defendant's "negligence was a cause"]) and the theory of negligence per se for a statutory traffic law violation (BAJI No. 3.45 [negligence per se results where *violation of the statute* causes

injury]).[4] The instruction Gorovitz cites on cause of injury having to be a "substantial factor" does not purport to address *what* must cause the harm (BAJI No. 3.76), and an instruction on concurrent causes properly spoke of "*negligent or wrongful conduct* of two or more persons contribut[ing] concurrently" to cause an injury (BAJI No. 3.77, italics added). Gorovitz goes on at length about foreseeable intervening causes (*Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 725-726; *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 573 & fn. 9; *Hardison v. Bushnell* (1993) 18 Cal.App.4th 22, 27-28; *Pappert v. San Diego Gas & Electric Co.* (1982) 137 Cal.App.3d 205, 210-211), urging that the truck driver's negligence was not such a cause. He tilts at windmills, however, for no such instruction (see BAJI No. 3.79) was given in this trial and therefore cannot account for the verdict. Finally, the verdict form's causation question, like the instructions, asked (italics ours), "Was such *negligence* a cause of damage to the plaintiff?"

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[4] Gorovitz assumes that the jury relied on negligence per se to find Marshall negligent in speeding, and from that premise he concludes that, since the negligence per se instruction *itself required causation* in order to apply (BAJI No. 3.45), the jury's verdict finding of no causation is inconsistent. We reject his premise and his conclusion.

Negligence per se does include factual elements of legal violation and proximate cause of injury—plus court-decided legal elements that the injury be one that the law was designed to prevent and that the injured person be among the class of persons the law was designed to protect. (*Capolungo v. Bondi* (1986) 179 Cal.App.3d 346, 349-354; Evid. Code, § 669.) Negligence per se, however, is just one *theory* of negligence, and here it was offered with numerous standard instructions on negligent conduct and prudent driving (e.g., BAJI Nos. 3.10, 3.11, 3.12, 3.13, 3.14, 5.00, 5.20, 5.30). There is no reason to conclude that the jury inconsistently relied on negligence per se; in fact, our duty on appeal is to presume, in *support* of the verdict, that they did *not* act inconsistently. Their apparent reliance on a five-mph violation of a speed law does not mean they necessarily relied on negligence per se, as opposed to ordinary negligence principles. BAJI No. 5.30 advised them: "The speed at which a vehicle is driven upon a highway, considered as an isolated fact and simply in terms of so many miles an hour, is not proof either of negligence or of the exercise of ordinary care. [¶] Whether driving at that rate of speed is negligent, is a question of fact, the answer to which depends on all the surrounding circumstances."

And so we come to the key question: Is there substantial evidence that Marshall's speeding did not proximately cause the accident? Under the instructions as applied to our facts, the precise question was whether her speeding was a "substantial factor in bringing about" the collision, which in turn created "an injury, damage, loss or harm" (BAJI No. 3.76; *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1051-1053). Stated differently, since Gorovitz challenges a *negative finding* (no causation), he cannot prevail on appeal unless he shows that the evidence compels the contrary finding (causation) as a matter of law or, in other words, is "the only reasonable hypothesis" (*Horn v. Oh* (1983) 147 Cal.App.3d 1094, 1099 [reviewing a no-negligence finding]). Gorovitz does not meet that burden.

His argument is that if Marshall had been going 55 rather than 60 mph, she might not have collided with his vehicle at all. We agree that the evidence permitted diverse inferences, given that the speed of Marshall's car could have affected the distance it spun and slid upon veering left to avoid the truck. However, we find substantial evidence for the jury's implicit finding that her negligent speeding was not a substantial factor. First, Marshall's accident reconstruction expert, James Hughes, testified on cross-examination that Marshall would have had to veer left even at 55 mph. "Q. And it was your opinion at the deposition that the speed Mrs. [Marshall] was traveling was sufficiently fast; that she really didn't have time to slow down and pull off to the right in these circumstances, correct? [¶] A. Yes. At 55 she didn't have—or 56 she didn't have sufficient time." Gorovitz, whose counsel elicited that testimony, does not seem to dispute its sufficiency.

What he disputes is this later testimony, given by Hughes on redirect: "Q. . . . You understand [Mrs. Marshall] admitted to doing 60 miles an hour and the speed limit here is 55 miles an hour? [¶] A. Yes. [¶] Q. Do you think that has anything to do with causing this accident? [¶] A. It would have changed how she got hit, but that is about all. [¶] Q. So the accident would have happened whether or not she was going 55 or 60? [¶] A. Yes. She just traveled a little bit further into the roadway. Instead of getting clipped on the rear end she would have been broadsided." The clear implication is that Marshall's speeding made the impact *less severe*. Gorovitz's counsel did not raise

any objection to that testimony or explore it further on recross-examination, except to elicit this exchange: "Q. And while it might not make a difference in your opinion between going 60—55 and 60 miles an hour on this road itself, it would make a difference if you were going, say, 40 miles an hour, wouldn't it, in terms of your ability to slow down, your ability to stop, your ability to react? [¶] A. The slower you go the easier it gets." Hughes added: "The slower you go you are more prudent. I think it is reasonable at 55."

Gorovitz's failure to raise any objection to the testimony forfeits any formal or foundational challenges on appeal (cf. *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1208; see generally *People v. Waidla* (2000) 22 Cal.4th 690, 717; *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1), leaving him to argue that the facts are simply insufficient to support the opinion that the speeding played no part in causing the collision. He stresses that expert opinion is no better than the facts upon which it is based (*People v. Gardeley* (1996) 14 Cal.4th 605, 618), but Gorovitz does not show lack of support.

Gorovitz says Hughes "never performed a speed analysis" but does not explain what he means by "a speed analysis" and cites nothing in the record to show that none was performed. Our own review of the testimony shows that Hughes had 32 years of experience in traffic accident investigation and reconstruction, much of it as a teacher. His testimony centered on G forces and delta velocities in the ultimate collision, but he had also been asked "to look at everything," had reviewed many reports and depositions, including those of other experts in the case, plus photographs of the site and vehicles. He had visited the site himself, had driven Lopes Road north and south past the place where Marshall's car left the road, and had taken photographs. His testimony shows familiarity with the lay of the highway at that point. We cannot say on this record that his opinion lacked factual support and was, as Gorovitz insists, "mere speculation."

Gorovitz says Hughes "conceded that if [Marshall] was driving slower an accident would have been less likely," but he omits to mention that this referred to speeds below 55 mph and that Hughes found her speed "reasonable at 55." He notes that Hughes said

he did not, in fact, know Marshall's "true rate of speed," but the testimony shows that his "understanding" was that she was going 60 mph and, according to the police report, 65 mph. Also, we understand his testimony to have been based on *hypothetical* speeds of 55 and 60 mph, and the record allows us to presume that the jury ultimately found that her speed was in fact 60 mph, as in the hypothetical.

In his reply brief, Gorovitz offers a backup argument at odds with his earlier briefing. In his opening brief, he ridiculed a defense argument about Marshall's possible negligence *before* the accident as "irrelevant conduct inadmissible under Evidence Code section 350" and protested that her "speeding at some point 'before' she lost control of her vehicle instead of at the time she lost control" was "entirely unrelated." Now, in the reply brief, he argues that Marshall's possible speeding miles before losing control was crucially relevant to causation. In a but-for analysis, he reasons that if she had been going 55 instead of 60 mph for any significant time before encountering the truck, she might not have encountered it at all or, if she had, would not have been at a point where veering left would have produced a collision with Gorovitz's vehicle. Acknowledging that the duration of Marshall's speeding before meeting the truck was never explored at trial, Gorovitz relies on her testimony that she glanced down to notice her 60-mph speed just before seeing the truck. From this he supposes that she "was driving a consistent, yet excessive, rate of speed for quite a length of time, perhaps for as much as a mile or two," and he calculates that she would have traveled 441 feet further for each minute she drove at 60 mph, rather than at 55 mph. It is unclear whether he would have us apply this theory beyond causation, to the doctrine of imminent peril, but in any event, he calls Hughes's opinion about this collision occurring at 55 mph a "physical impossibility."

Marshall has had no opportunity to brief this issue, but we question whether Gorovitz's approach is legally sound. He cites no authority for the proposition that, in assessing proximate cause, a trier of fact may consider the travel-time effect of negligent speeding (or any negligence conduct) that *precedes* the point of imminent peril or other precipitating event. This failure to cite pertinent legal authority is enough reason to reject

the argument (*Balesteri v. Holler* (1978) 87 Cal.App.3d 717, 720; *People v. Foote* (2001) 91 Cal.App.4th Supp. 7, 12), and so we do. There are further reasons.

A second one is instructional. Pertinent instructions called the jury's attention to alleged negligence existing *at the point of* the precipitating event, not before it, and thus there was no instructional support for the new theory. Under it, Marshall's speeding in the seconds or minutes before the truck (imminent peril) appeared would have been a concurrent cause of an ensuing collision, yet the instruction on concurrent causes (BAJI No. 3.77) spoke of when "negligent or wrongful conduct of two or more persons *contributes concurrently* as a cause of an injury" and defined *concurrently* as "*operative at the moment of injury* and act[ing] *with another cause* to produce the injury" (italics added). The imminent peril instruction (BAJI No. 4.40) similarly spoke of one who, "*without negligence* on her part," is "confronted with peril" and "*at that moment*" does "what appears to her to be the best thing to do . . ." (italics added). These instructions did not ask jurors to consider the effects of any negligence *preceding* the peril or loss of control, and we are not cited to anyplace in the record where Gorovitz requested and was refused a pertinent modification of the instructions. The theory therefore fails as waived by failure to request pertinent further instruction. (Cf. *People v. Guiuan* (1998) 18 Cal.4th 558, 570 [" 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language' "].)

A third reason is that Gorovitz does not posit his theory until his closing brief, a breach of rudimentary appellate procedure that unfairly deprives us of full briefing on the issue (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11 [asserted duty to minimize damages]; *Hibernia Sav. and Loan Soc. v. Farnham* (1908) 153 Cal. 578, 584-585 [claimed insufficient evidence, error in ruling on motion to strike]; *Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 641 [claimed erroneous/confusing instruction].) It is doubly unfair here, where he ridiculed the same idea as legally irrelevant in his opening brief.

A fourth reason to reject the theory is, simply, that it was never raised below or argued to the jury and therefore constitutes a theory improperly raised for the first time

on appeal. "A party may not for the first time on appeal present a new theory that '. . . contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial. . . .' " (*Cramer v. Morrison* (1979) 88 Cal.App.3d 873, 887, quoting *Panopulos v. Maderis* (1956) 47 Cal.2d 337, 341.) Here, Gorovitz's failure to raise and develop his theory at trial leaves him with a record that does not support him, factually, beyond conjecture. He assumes that Marshall may have been speeding for as far as several miles before her near miss with the truck, but she was not asked whether or how long beforehand she may have been speeding or, if so, whether it was a continuous and steady speeding or, perhaps, only an intermittent or fluctuating drifting between 55 and 60 mph. We can only glean from Marshall's testimony that it was her "habit to check [her] speedometer fairly regularly," that she thought she was "driving the normal speed limit" but "looked down at the speedometer and saw it was 60 and thought [she] needed to slow it down a little bit," and that, before she could do so, she "suddenly saw" the truck's lights coming. With the facts so open to question, Gorovitz cannot raise his theory for the first time now.

The verdict finding of no causation is supported by substantial evidence; we cannot say causation is the only reasonable hypothesis to be drawn from the evidence. This conclusion leaves no need to explore the parties' further arguments about whether the jury could have completely discounted or disbelieved all pertinent evidence of the harms Gorovitz claimed to have suffered from the collision.

III. *Posttrial Motions*

Gorovitz raised similar causation arguments in posttrial motions for judgment notwithstanding the verdict (Code Civ. Proc., § 629), and new trial (Code Civ. Proc., § 657, subds. 5 and 6). His notice of appeal challenges the denial of those motions, but his briefing raises nothing distinct from what we have already considered above (see review standards in *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 877-878 [judgment notwithstanding the verdict], and *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 411-412, 415-416 [new trial]). We treat as forfeited any distinct arguments he may have had on his posttrial motions. (*Mann v. Cracchiolo* (1983)

38 Cal.3d 18, 41.) Alternatively, he fails to show abuse of discretion or other error in those rulings.

DISPOSITION

The judgment is affirmed.

_____
Kline, P.J.

We concur:

_____
Haerle, J.

_____
Ruvolo, J.